A

Kesang Leasing Sdn Bhd v Dato' Hj Mat @ Mat Shah bin Ahmad & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–193 OF 1996
MOHD HISHAMUDIN J
28 OCTOBER 2008

C *Bankruptcy — Capacity of bankrupt — Application to reopen case — Interlocutory application to cross-examine plaintiff's witness — Whether defendant had right to apply to reopen case after conclusion of case*

D *Civil Procedure — Trial — Procedure — Application by defendant to reopen case — Discretion of trial judge — Whether court had discretion to reopen case after conclusion of case — Whether defendant had provided satisfactory reason for delay in filing application to reopen case*

E

In the present civil suit the plaintiff was only claiming against the first defendant ('the defendant'), having withdrawn its claims against the second, third and fourth defendants. The defendant had allegedly committed a
F breach of his fiduciary duties as a director of the plaintiff company and the plaintiff was claiming damages for the alleged breach. While the trial, which began on 21 March 2005, was ongoing the defendant was adjudged bankrupt on 11 July 2005. On 23 January 2007 the plaintiff obtained the leave of the bankruptcy court to proceed against the defendant. The defendant also
G applied to the Director General of Insolvency ('DGI') for sanction under s 38(1)(a) of the Bankruptcy Act 1967 ('the Act') to defend the action and to retain counsel in this suit. In this interlocutory application the defendant had applied for an order to be allowed to cross-examine the plaintiff's sole witness at the trial. On 13 September 2007, when the suit was called up for
H continued hearing the DGI and counsel who appeared as amicus curiae on behalf of the defendant applied for an adjournment. The DGI applied for an adjournment on the grounds that that the defendant's application for sanction was still being processed by the DGI's department and also because the defendant had been unco-operative and failed to present himself at the
I DGI's office until three days before the trial continuation date. Counsel who appeared as amicus curiae on behalf of the defendant also applied for an adjournment on the grounds that the defendant was still awaiting sanction from the DGI to defend the action and furthermore because the defendant was unwell to attend court. A medical certificate was tendered as proof of the

defendant's inability to attend court. The court however disallowed the application for an adjournment and directed the trial to proceed. The trial resumed with the plaintiff calling upon its only witness and re-examining the witness without the DGI cross-examining the witness or proceeding with its defence because the defendant was on medical leave. When the trial concluded directions were issued for the filing and service of the written submissions and the date of decision was fixed on 4 February 2008. In the meantime, on 15 November 2007 the bankruptcy court annulled the receiving and adjudicating orders against the defendant. On 4 February 2008, the court did not deliver its decision because instead the defendant applied to reopen the case and to cross-examine the plaintiff's witness and to also present his case. The main issue before the court in this case was whether the court had the discretion to reopen the case at this stage.

Held, dismissing the application with costs:

(1) Although the defence in the present case closed its case on 13 September 2007 and the defendant ceased to be a bankrupt on 15 November 2007, the defendant had not applied to reopen the case until 17 April 2008. In addition he had not furnished a satisfactory reason for this delay in filing his application (see para 15).

(2) The defendant had shown no interest to proceed with the action. This was clear from the remarks by the DGI who represented the defendant at the proceedings on 13 September 2007. The DGI had informed the court that the defendant was not co-operative and had failed to present himself at the office to discuss the case (see para 18).

(3) The fact that the defendant was absent from the continued hearing on 13 September 2007 without a valid reason was also proof of the defendant's disinterest in the action. The medical certificate tendered by counsel who appeared as amicus curiae, was unacceptable documentary evidence that lacked credibility. This was because the medical certificate was not clear as to the nature of the defendant's alleged illness and the doctor who issued it was not called upon to explain why the defendant was unfit to attend court. In addition the medical certificate itself was ambiguous and did not say whether the defendant was unfit to attend court. Furthermore, the medical certificate was not tendered through the DGI who was the most appropriate person to hand over the medical certificate but through an amicus curiae, which is another questionable factor (see paras 18 & 23).

[Bahasa Malaysia summary

Di dalam guaman sivil ini plaintif hanya menuntut terhadap defendan

pertama ('defendan'), setelah menarik balik tuntutan-tuntutan terhadap defendan-defendan kedua, ketiga dan keempat. Defendan didakwa melakukan kemungkiran tanggungjawab fidusiari sebagai pengarah syarikat plaintif dan plaintif menuntut ganti rugi bagi kemungkiran yang didakwa tersebut. Apabila perbicaraan, yang bermula pada 21 Mac 2005, sedang berlangsung defendan dihakimi sebagai seorang yang bankrap pada 11 Julai 2005. Pada 23 Januari 2007 plaintif mendapat kebenaran daripada mahkamah kebankrapan untuk meneruskan tuntutan terhadap defendan. Defendan juga memohon kepada Ketua Pengarah Insolvensi ('KPI') untuk sanksi di bawah s 38(1)(a) Akta Kebankrapan 1967 ('Akta tersebut') untuk membela tindakan tersebut dan untuk mengekalkan peguam di dalam guaman ini. Di dalam permohonan interlokutori ini defendan telah memohon agar satu perintah dibenarkan untuk memeriksa balas saksi tunggal plaintif semasa perbicaraan. Pada 13 September 2007, apabila guaman dipanggil untuk sambung bicara KPI dan peguam yang hadir sebagai amicus curiae bagi pihak defendan memohon untuk penangguhan. KPI memohon untuk satu penangguhan atas alasan bahawa permohonan defendan untuk sanksi masih sedang diproses oleh jabatan KPI dan juga kerana defendan tidak bekerjasama dan gagal untuk hadir di pejabat KPI sehingga tiga hari sebelum tarikh sambungan perbicaraan. Peguam tersebut yang hadir sebagai amicus curiae bagi pihak defendan juga memohon untuk satu penangguhan atas alasan bahawa defendan masih menunggu sanksi daripada KPI untuk membela tindakan tersebut dan tambahan lagi kerana defendan tidak sihat untuk hadir di mahkamah. Satu sijil sakit telah ditenderkan sebagai bukti ketidakupayaan defendan untuk hadir di mahkamah. Mahkamah walau bagaimanapun tidak membenarkan permohonan untuk penangguhan dan mengarahkan perbicaraan itu diteruskan. Perbicaraan tersebut disambung semula dengan plaintif memanggil saksi tunggalnya dan memeriksa semula saksi tersebut tanpa KPI memeriksa balas saksi tersebut atau meneruskan dengan pembelaannya kerana defendan cuti sakit. Apabila perbicaraan telah selesai arahan-arahan dikeluarkan untuk pemfailan dan penyampaian penghujahan bertulis dan tarikh keputusan telah ditetapkan pada 4 Februari 2008. Sementara itu, pada 15 November 2007 mahkamah kebankrapan membatalkan perintah-perintah penerimaan dan penghakiman terhadap defendan. Pada 4 Februari 2008, mahkamah tidak menyampaikan keputusannya kerana sebaliknya defendan memohon untuk membuka semula kes tersebut dan untuk memeriksa balas saksi plaintif dan mengemukakan kesnya. Isu utama di hadapan mahkamah dalam kes ini adalah sama ada mahkamah mempunyai budi bicara untuk membuka semula kes ini pada peringkat ini.

Diputuskan, menolak permohonan dengan kos:

(1) Walaupun defendan di dalam kes ini menutup kesnya pada

13 September 2007 dan defendan tidak lagi menjadi seorang bankrap pada 15 November 2007, defendan tidak memohon untuk membuka semula kes tersebut sehingga 17 April 2008. Tambahan pula dia tidak mengemukakan alasan yang munasabah untuk kelewatan ini dalam memfail permohonannya (lihat perenggan 15).

(2) Defendan tidak menunjukkan sebarang minat untuk meneruskan dengan tindakan ini. Ini adalah jelas daripada kata-kata KPI yang mewakili defendan pada prosiding pada 13 September 2007. KPI telah memaklumkan kepada mahkamah bahawa defendan tidak memberi kerjasama dan telah gagal untuk menghadirkan diri di pejabatnya untuk membincangkan kes tersebut (lihat perenggan 18).

(3) Hakikat bahawa defendan tidak hadir pada sambung bicara pada 3 September 2007 tanpa alasan yang sah adalah juga bukti tentang kurang minat defendan di dalam tindakan tersebut. Sijil sakit yang dikemukakan oleh peguam yang hadir sebagai amicus curiae, adalah keterangan dokumentari yang tidak boleh diterima dan tidak boleh dipercayai. Ini adalah kerana sijil sakit tersebut adalah tidak jelas tentang sifat penyakit yang dialami oleh defendan yang didakwa itu dan doktor yang mengeluarkannya tidak dipanggil untuk menjelaskan kenapa defendan tidak sihat untuk hadir di mahkamah. Bahkan sijil sakit tersebut adalah tidak jelas dan tidak menyatakan sama ada defendan tidak sihat untuk hadir di mahkamah. Tambahan lagi, sijil sakit itu tidak ditenderkan melalui KPI yang merupakan orang yang paling sesuai untuk menyerahkan sijil sakit tersebut tetapi melalui seorang amicus curiae, yang merupakan satu lagi faktor yang boleh dipersoalkan (lihat perenggan 18 & 23).]

Notes

For cases on capacity of bankrupt generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2330–2354.

For cases on procedure, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7870–7871.

Cases referred to

Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8(1), 38(1)(a)

S Shamalah (De Silva) for the plaintiff.
Deepinder Kaur (David Lingam & Co) for the first defendant.

Mohd Hishamudin J:

[1] Enclosure 105 is an interlocutory application by the first defendant by summons in chambers seeking an order that the first defendant be allowed to cross-examine the plaintiff's sole witness at the trial.

[2] I have dismissed the application with costs.

[3] In the present civil suit, the plaintiff's claim at the present moment is only against the first defendant. The plaintiff's claims against the second, third and fourth defendants have previously been withdrawn.

[4] The plaintiff's claim against the first defendant is for damages for breach of fiduciary duty as a director of the plaintiff company.

[5] The trial of the present case began on 21 March 2005. However, while the trial was still ongoing, the first defendant was adjudged a bankrupt on 11 July 2005. The plaintiff applied for and obtained leave of the bankruptcy court on 23 January 2007 to proceed against the first defendant pursuant to s 8(1) of the Bankruptcy Act 1967. On 30 March 2007 when the case was called up for continued hearing, with the officer from the office of the Director General of Insolvency being present as well at the trial, a counsel, Mr David Lingam informed the court that he had been engaged by the first defendant to represent him and that the first defendant had applied to the Director General of Insolvency for sanction pursuant to s 38(1)(a) of the Bankruptcy Act to defend the action and to retain Messrs David Lingam & Co as his solicitors and Mr David Lingam as his counsel. The case was then adjourned to 2 July 2007 for the court to make a ruling on a point of law (for the purpose of the present application it is unnecessary for me to state here what the point of law is). However, on 2 July 2007, the court having made the ruling, directed that the continuation of the trial be held on 13 September 2007; and that if by that date no sanction of the Director General of Insolvency was obtained by the first defendant, then the court will proceed with the trial with the Director General of Insolvency as the defendant; and that, if the Director General of Insolvency on that date was desirous of defending the action, he ought to be ready to proceed with the trial.

[6] Now, on 13 September 2007 both the senior federal counsel (Encik Zahari Mohd Nor, representing the Director General of Insolvency) and Encik Sadacharam Raman who appeared as amicus curiae on behalf of the first defendant applied for an adjournment. Encik Zahari Mohd Nor, the senior federal counsel, applied for an adjournment on the grounds, firstly,

that the first defendant's application for sanction was still being processed by the Director General of Insolvency's Department; and, secondly, that he was in no position to proceed with the trial as the first defendant had failed to present himself at his (senior federal counsel's) office and had not been cooperative. Encik Zahari disclosed to the court that the proper application for sanction was submitted by the first defendant to the Director General of Insolvency very late, that is to say, it was submitted only on 10 September 2007, just three days before the trial continuation date of 13 September 2007. And even then it was only submitted after a reminder had been sent by the Director General to the first defendant's solicitors, Messrs David Lingam & Co on 20 July 2007. The senior federal counsel added that apart from the pleadings he did not have the full set of documents pertaining to the case with him. Encik Sadacharam, on his part, applied for an adjournment on the grounds that the first defendant was still awaiting the Director General of Insolvency's sanction; and, secondly, the first defendant was unwell to attend court. Encik Sadacharam tendered a medical certificate which he said he received from the first defendant's office.

[7] Learned counsel for the plaintiff, Cik Tricia Mallika Appaduray, opposed the application for adjournment.

[8] I disallowed the application for adjournment and directed the trial to proceed.

[9] Now on that day (13 September 2007) the trial was to continue with the senior federal counsel cross-examining the plaintiff's only witness. The senior federal counsel frankly informed the court that he was ill-prepared for the case (for the reasons that I have mentioned earlier) and thus was in no position to cross-examine the witness. Counsel for the plaintiff then proceeded to re-examine the witness. That witness was the only witness for the plaintiff. The plaintiff then closed its case.

[10] The senior federal counsel informed the court that he was in no position to proceed with the defence as the first defendant was on medical leave and that he had no other witnesses. Under the circumstances, I then deemed the trial as concluded and issued directions for the filing and serving of written submissions, and I fixed 4 February 2008 as the date of decision.

[11] Meanwhile, the receiving order and the adjudicating order against the first defendant were annulled by the bankruptcy court on 15 November 2007.

[12] Now, reverting to the present application, the following are my grounds for disallowing the first defendant's application.

[13] Firstly, the trial had already been concluded on 13 September 2007 and only awaiting decision of the court. At the continuation of the trial on 13 September 2007, the defence (the defendant then being the Director General of Insolvency, as the first defendant was still a bankrupt) did not call any witness. Subsequently, in accordance with the directions of the court given at the conclusion of the trial on 13 September 2007, written submissions by counsel for the plaintiff as well as by the senior federal counsel/Director General of Insolvency (who represented the first defendant at the material time as the first defendant was a bankrupt) had been filed and served. What only was left was for the court to deliver its decision on 4 February 2008. However, on 4 February 2008 the court did not deliver its decision because on that day, at the commencement of the proceeding, the learned counsel for the first defendant informed the court that the receiving order and adjudicating order against first defendant had been annulled by the bankruptcy court on 15 November 2007, and that the first defendant now wished to apply to reopen the case, to cross-examine the plaintiff's witness, and, thereafter, to present the defendant's case.

[14] The broad principle as to how the court is to exercise its discretion in such a situation as the present is enunciated by the Court of Appeal in *Tan Kah Kiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445; [2006] 4 CLJ 715. In this case, Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, states (at p 452 of MLJ; p 725 of CLJ):

> For temporarily speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that a discretion may be exercised at the stage where the application is made immediately after a party closes its case. But it may be less likely that a discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[15] In the present case, it is pertinent to observe that although the defence closed its case on 13 September 2007 and that the first defendant ceased to be a bankrupt on 15 November 2007, yet the present application was not made by the first defendant promptly: it was not made until 17 April 2008 when the present application was filed. No satisfactory explanation is furnished by the first defendant for this long delay in filing encl 105. In para 20 of his supporting affidavit, the first defendant gives the reason for the delay in making the application as follows:

20 Jika terdapat apa-apa kelewatan dalam membuat permohonan ini (yang mana dinafikan), ia adalah disebabkan oleh masa yang diambil oleh saya untuk membatalkan perintah-perintah penerimaan dan penghukuman terhadap saya dan seterusnya mengarahkan peguamcara saya untuk membuat permohonan ini.

[16] The above cannot be the true reason for the delay because the first defendant obtained the annulment order from the bankruptcy court as early as 15 November 2007.

[17] Secondly, as can be seen from the notes of the evidence for the proceeding on 13 September 2007, the learned senior federal counsel, representing the Director General of Insolvency, had informed the court that he was unable to proceed with the trial as the first defendant had not been cooperative and had never presented himself at the senior federal counsel's office to discuss the case.

[18] Thirdly, the first defendant has shown no interest to proceed with the action. He was absent on 13 September 2007 without a valid reason. The trial was supposed to continue on that day. However, the first defendant on that day tendered a medical certificate. But I found the medical certificate tendered through counsel, Mr Sadacharam Raman, who appeared as amicus curiae, wanting and hence unacceptable. As documentary evidence, the alleged medical certificate lacks credibility. Firstly, the medical certificate was not clear as to the nature of the first defendant's alleged illness. Secondly, the doctor who issued the medical certificate was not called to explain as to why the first defendant was unfit to attend court. Thirdly, the medical certificate itself does not say that the first defendant was not fit to attend court: for limb (c) of the medical certificate merely says:

(c) Beliau tidak sihat untuk menjalankan tugasnya dengan sempurna pada/daripada 12/9/07 hingga 13/9/07 selama (Dua) hari.

[19] Fourthly, the medical certificate is ambiguous. To begin with, the first defendant seems to be relying on limb (c) of the medical certificate. But, importantly, limb (a) of the medical certificate says:

(a) Beliau boleh menjalankan tugas, ...

[20] Now, it is significant to note that this limb (a) of the medical certificate, unlike limb (b) of the same, was not deleted by the issuing authority. Limb (b) reads:

(b) Beliau boleh menjalankan tugas terhad, ... (sila nyatakan) pada/daripada ... hingga ... selama ... (...) hari.

[21] This limb (b) was deleted by the issuing authority. Now, if limb (b) of the medical certificate could be and was in fact deleted by the authority issuing the medical certificate, why wasn't limb (a) deleted as well? The fair inference to make is that the issuing authority had no intention of deleting limb (a). It then follows that if the first defendant was '*fit to carry out his duties*', then there was no reason for him to be absent from court! But if this is the case, how does one reconcile limb (a) with limb (c)!

[22] The first defendant in his supporting affidavit now states that he was unable to attend court on that day because he had high fever. I am unable to accept this assertion because this was the first time that the court was informed of this reason. If indeed he was having high fever on 13 September why did the doctor say so in the medical certificate in no uncertain terms; or, why did Mr Sadacharam not say so in court on 13 September? But in the first place why the medical certificate was not tendered through the senior federal counsel who represented the Director General of Insolvency; why was it tendered merely through an amicus curiae? If indeed he was unfit to attend court on that day, and since on that day the first defendant was still a bankrupt, was the Director General of Insolvency (or the senior federal counsel) the appropriate person for the first defendant to inform and to hand over his medical certificate?

[23] But it is pertinent to note that it was not only on this date (30 September 2007) that the first defendant failed to attend trial without a valid reason. Previously the first defendant had absented himself from court on three occasions without a valid reason, although in respect of each of the occasions he had been previously informed in writing by the court to attend the court proceedings. The dates are 18 December 2006 (for continued hearing), 5 February 2007 (for mention), and 30 March 2007 (for continued hearing).

[24] Application dismissed with costs. However, on 10 October 2008, counsel for the first defendant was allowed to file and serve written submission on the trial as a whole, and decision on the whole trial would be delivered on 9 January 2009.

Application dismissed with costs.

Reported by K Nesan